MEMORANDUM

To: SCPD Policy & Law Committee

From: Brian J. Hartman

Re: July Regulatory Initiatives

Date: July 8, 2007

I am providing my analysis of eight (8) regulatory initiatives in anticipation of the July 12 meeting. Given time constraints, my commentary should be considered preliminary and non-exhaustive.

1. Dept. of Insurance Final MCO Certification & Operations Reg [11 DE Reg. 73 (July 1, 2007)]

This is an information item.

In February, 2007, the Department of Insurance issued both emergency and proposed regulations covering the eligibility of managed care organizations (MCOs) for a certificate of authority and operation. The emergency and proposed regulations were published at 10 DE Reg. 1190 and 1249 (February 1, 2007) respectively. The changes were prompted by enactment of S.B. No. 295 in 2006. The SCPD, DDC, and GACEC submitted comments on the proposed version of the regulations. I attach the March 5 GACEC letter containing the five (5) recommendations issued by the Councils. In April, the Department issued a second emergency regulation extending the expiration date of the original emergency regulation to June 30. The Department has now issued final regulations with no changes.

In the "Summary of Evidence" section, the Department acknowledges receipt of comments from the DDC and SCPD, but not the GACEC. It recites that the Councils were "supportive" of the regulation but does not address any of the Councils' recommendations. Likewise, the Department received extensive comments from the insurance industry and the Emergency Medicine Coalition of Delaware. The expressed rationale for effecting no amendments based on the comments of all groups is rather unenlightening:

> The reasons given during the public comment for suggested changes to the proposed amendments are not sufficiency persuasive to require me to make changes to the proposed regulation as originally published for comment.

Since the regulations are final, I recommend no further action.

2. Dept. of Insurance Final MCO Appeal Regulation [11 DE Reg. 68 (July 1, 2007)]

This is an information item..

In February, 2007, the Department issued proposed regulations covering review and appeal of MCO decisions [10 DE Reg. 1033 (February 1, 2007)] The SCPD, DDC, and GACEC generally endorsed the regulations while submitting ten (10) recommended amendments. The Department then reissued proposed regulations in April [10 DE Reg. 1523 (April 1, 2007)]. The new regulations were almost identical to the February version. The Councils essentially resubmitted their February comments. I attach the April 26, 2007 GACEC letter for reference. The Department has now issued final regulations with no changes.

In the "Summary of Evidence" section, the Department acknowledges receipt of comments from the DDC and SCPD, but not the GACEC. It recites that the Councils were "supportive" of the regulation but does not address any of the Councils' recommendations. Likewise, the Department received extensive comments from the insurance industry, Christiana Care, and the Emergency Medicine Coalition of Delaware. The expressed rationale for effecting no amendments based on the comments of all groups is rather unenlightening:

> The reasons given during the public comment for suggested changes to the proposed amendments are not sufficiency persuasive to require me to make changes to the proposed regulation as originally published for comment.

Since the regulations are final, I recommend no further action.

3. Dept. of Insurance Proposed Discrimination Regulation [11 DE Reg. 32 (July 1, 2007)]

The Department of Insurance initially issued these proposed regulations in May, 2007 [10 DE Reg. 1670 (May 1, 2007)]. The SCPD and GACEC commented on the May draft and shared four (4) recommendations. I attach the May 22 GACEC letter for reference. The Department has now reissued a revised set of proposed regulations.

I have the following observations.

First, the preface to the regulation is somewhat misleading. It establishes a June 4 deadline for comments. It also recites that "(t)he text of the proposed amendment is reproduced in the May 2007 edition of the Delaware Registry of Regulations." This is inaccurate since the July version of the regulations contains at least three (3) changes from the May version, i.e., insertion of "and annuities" in §3.1, deletion of "or is related to" in §3.1, and substitution of October 1 for August 1 for the effective date.

Second, of the four (4) comments in the GACEC letter, the Department incorporated the "Fourth" recommendation into the July version of the regulation, i.e., it deleted the term "or is related to". However, the "First" through "Third" comments remain apt and should be reiterated. The recommendation to add a §3.2 should also be reiterated. Essentially, there are some statutory limits on refusals to issue life or health insurance policies to persons who are blind or deaf as well as limits on insurer use of genetic characteristics and information.

In sum, I recommend issuance of commentary as follows: 1) noting that the preamble to the regulation is somewhat misleading; 2) thanking the Department for deleting "or is related to" in §3.0; 3) reiterating prior observations "First" through "Third"; and 4) reiterating the prior recommendation to add a new §3.2.

4. DMMA Proposed LTC Promissory Note & Life Estate Regs. [11 DE Reg. 20 (July 1, 2007)]

The Division of Medicaid & Medical Assistance issued proposed regulations in February, 2007 covering the valuation of promissory notes and life estates in the context of the LTC Medicaid program. In its commentary, the SCPD recommended four (4) amendments. In April, the Division issued final regulations [10 DE Reg. 1596 (April 1, 2007)] which incorporated all of the Council's suggestions with one exception, i.e., the regulation deleted an authorization for a note holder to demonstrate that the note's value was less than its outstanding principal balance. For example, the value of a note may decrease based on the bankruptcy of a promissor or destruction of mortgaged premises. Although the regulations were final, the SCPD solicited reconsideration by the Medicaid Director. The Director agreed with the Council's concern and the Division has now issued a proposed regulation authorizing a note holder to present proof of devaluation of a note.

I recommend that the Council thank the Division for issuing the proposed regulation while sharing two (2) suggested amendments to §20330.3.1.

First, the word "or" should be inserted between "loan," and "mortgage".

Second, the word "instrument" should be substituted for "agreement". The word "instrument" is legal term of art for a formal document and is commonly used to refer to mortgages, loans, and notes. It is a more apt term than agreement in this context. For example, the Delaware Uniform Commercial Code defines a promissory note as an "instrument" [Title 6 Del.C. §9-102(a)(65)] and defines an "instrument" as "a negotiable instrument or any other writing that evidences a right to the payment of a monetary obligation..." [Title 6 Del.C. §9-102(a)(47)].

5. DMMA Prop. Chronic Renal Disease Program Referral Reg. [11 DE Reg. 21 (July 1, 2007)]

The Division of Medicaid & Medical Assistance proposes to amend the "referral" regulation for the Chronic Renal Disease Program (CRDP).

As background, the Program was established in 1970 to provide dialysis and other treatment to Delawareans with chronic renal diseases. For specifics, see the enabling legislation codified at Title 29 Del.C. §§7932-7935. The program is 100% state funded.

The proposed amendments to the referral process are benign. They clarify that referrals to the program can be made from many sources. On request, an application will be forwarded by mail or fax and returned by mail or fax. The positive aspects to the revisions include an explicit authorization to obtain an application form by fax and explicit authorization to return a completed application back to the Division by fax. Upon receipt, an appointment is made to

complete the application process.

I recommend endorsement with a single recommendation. Since the regulations contemplate quick access to the application, the Division may wish to consider inclusion of the application form on its website. Consistent with the attachments, the Department maintains a description of the CRDP on its website. The Department also has application forms on its website for some programs (e.g. Delaware Healthy Children Program). Indeed, the Department's "Assist" function allows Delawareans to self-screen for eligibility and file an application on-line for some programs.

6. DSS Proposed Non-Discrimination Policy [11 DE Reg. 23 (July 1, 2007)]

The Division of Social Services proposes to amend several regulations establishing its non-discrimination standards and processing of discrimination complaints. DSS recites that the impetus is U.S. Department of Agriculture (USDA) revisions to federal regulations which now address retaliation. I could not locate any recent USDA guidance in this context.

I have the following observations.

First, consistent with the attached USDA nondiscrimination statement, the Division covers the same eight (8) bases contained in the USDA policy: race, color, national origin, sex, religious creed, age, disability, and political beliefs. The Division may wish to consider whether State public policy also favors supplementing this list with "sexual orientation" and/or "marital status". For example, in the context of State employment, discrimination on such bases is prohibited. See attached Executive Order No. 86 (May 2, 2006).

Second, the Division addresses "retaliation" by simply adding it to the list of protected classes in §§9004, 1006.6, 1006.7, 1007, and 1007.3. This makes little sense. "Retaliation" is not a protected class. Rather, there should be a separate standard prohibiting retaliation against persons who file or facilitate a discrimination complaint or otherwise seek enforcement of the nondiscrimination regulations. For example, the attached USDA nondiscrimination regulation, Par. 4, identifies protected classes and then adds the following separate statement:

> No person shall be subjected to reprisal or harassment because he or she filed a discrimination complaint, participated in or contributed to the identification, investigation, prosecution, or resolution of civil rights violations in or by a recipient of Federal financial assistance from USDA; or otherwise aided or supported the enforcement of Federal or USDA civil rights laws, rules, regulations, or policies.

DSS should adopt some variation of this statement in its regulations. For example, it could recite as follows:

> No person shall directly or indirectly be subjected to retaliation, reprisal, or harassment because he or she has filed a discrimination complaint; participated in or contributed to the identification, investigation, or review of discrimination; or otherwise aided or supported the enforcement of nondiscrimination laws or regulations.

Third, the resolution of complaint regulation (§§1007.3) is somewhat anemic. It omits any authorization to provide individual relief to the complainant. For example, if a Deaf complainant alleged that staff refused to provide an interpreter necessary to complete a benefits application, or resulting in termination of benefits due to inability to effectively communicate, the regulation would not authorize an individual remedy (e.g. retroactive approval or reinstatement of benefits). By analogy, the attached DSS fair hearing regulation [§5501] explicitly authorizes corrective relief. At a minimum, §1007.3 would benefit from a similar authorization.

Fourth, §1006.6 contemplates publication of the Division's nondiscrimination policy through the media (television, radio, newspaper). It would be preferable to also add the Division's website.

Fifth, §1006.3 (attached) contemplates the availability of multiple complaint options (federal and state) for an alleged victim of discrimination. For example, there may be circumstances in which an applicant or recipient could either file a complaint under §1007.1 or request a fair hearing under the attached 16 Admin Code 5001. As noted above, a Deaf person wrongly denied an interpreter (violating the ADA) may be improperly denied benefits or have benefits terminated. Alternatively, a DSS employee could refuse to provide a reasonable accommodation to a person with a disability resulting in a denied application, termination of benefits, delay in receipt of benefits, or reduction in benefits. It would be preferable to add a non-supplanting provision to §1007.1. Cf. the Department of Education federal programs complaints regulation, 7 DE Reg. 188, 190, final footnote (August 1, 2003). The following paragraph could be added to §1007.1:

> The right to file a complaint under this section is not intended to be an exclusive remedy or supplant resort to other review systems which may otherwise be available, including 16 Admin Code 5000.

I recommend sharing the above observations and recommendations with the Division.

7. DSS Prop. Food Stamp "Household" Regulation [11 DE Reg. 25 (July 1, 2007)]

This is an important regulation.

The Division of Social Services proposes to amend the Food Stamp regulation defining "household". As the "Summary" section recites, the impetus behind this initiative is a June 12, 2006 USDA policy letter. I attach a copy of that letter downloaded from the USDA Food Stamp website.

The policy letter authorizes a "severely disabled" applicant to qualify as a separate

"household" under the Food Stamp program if the applicant arranges for another (even cohabiting) individual to purchase and prepare the applicant's food. This is advantageous to the person with a disability since the income of the other cohabiting individual(s) would not be counted towards the financial eligibility of the person with a disability. The proposed regulatory change to §9013.1 is well written and consistent with the policy letter. Although it does not adopt "people first" language, the substance of the standard is fine.

I recommend endorsement.

8. DDDS Proposed Eligibility Regulation [11 DE Reg. 18 (July 1, 2007)]

This is an important initiative with far-reaching consequences.

In April, 2007, the Division of Developmental Disabilities Services shared a pre-publication draft of new eligibility standards with the SCPD, DDC, and DLP. I provided some informal input on the draft at the April 17 meeting of the Governor's Advisory Council to DDDS. I later submitted the attached April 25 critique to DDDS. This was followed by an April 26 meeting with DDDS Administration in which representatives from the SCPD, DDC, GACEC, and DLP participated. The Councils were consistent in endorsing the DLP's comments. DDDS has now formally published new eligibility regulations with few changes from the pre-publication draft. I have the following observations.

First, DDDS requires submission of all written comments by July 25, 2007. This violates the APA, Title 29 Del.C. §10118(a). As a matter of law, individuals have the right to submit written comments for thirty (30) days after publication. The notice is affirmatively misleading. As a result, the Division should republish the proposed regulation with a notice which complies with the APA.

Second, the only substantive change prompted by the DLP's commentary is the addition of §1.5 which clarifies that the onset of the qualifying disability is before age 22, not age 18. However, for simplicity, the Division may wish to consider deletion of §1.5 and incorporating the concept in §1.3. Section 1.3 would then read as follows:

> 1.3. a disability/disorder originating before age 22 attributed to one or more of the following:

Third, §1.0 is obviously missing some words. It is also inconsistent with §1.3 which refers to both "disability/disorder" while §1.0 only refers to "disability". Section 1.0 could be corrected by substituting the following:

> 1.0. The Division of Developmental Disabilities Services provides services to individuals with a developmental disability/disorder who meet all of the following criteria:

Fourth, the format of the regulation is extremely "sloppy". For example, there is no punctuation whatsoever at the end of §§1.1, 1.2, 1.3.4, 1.4.1.2, and 1.5. It resembles a conceptual draft rather than a formal regulation.

Fifth, it is likely that some current DDDS clients would not qualify under the 2007 proposed regulation. For example, if someone originally qualified "with a neurological condition closely related to mental retardation", they may literally not meet the 2007 draft standards. Alternatively, the current regulation only requires that individuals with Prader Willi or brain injury have "substantial functional limitations in 2 or more ...adaptive skill areas" while the 2007 draft imposes a more prescriptive standard, i.e., "significant limitation in adaptive behavior ...that is at least two standard deviations below the mean" on standardized measures. When this was addressed at both the April 17 and April 26 meetings, DDDS Administration confirmed that it does not intend to reassess eligibility of current clients. Rather, their eligibility would essentially be "grandfathered". However, DDDS has declined to clarify this in the regulation. Consistent with my April 25 commentary, DDDS could accomplish this in different ways.

One option would be to change the introduction as follows:

> The Division of Developmental Disabilities Services (DDDS) provides services to individuals with a developmental disability/disorder who were determined eligible under a prior eligibility regulation or, for individuals applying after the effective date of this regulation, who meet the following criteria:

A second option would be to add a sentence or a regulatory note at the end akin to the following:

> DDDS clients determined eligible under a previous regulation shall not be required to requalify for eligibility, i.e., their eligibility is "grandfathered".

Sixth, consistent with my April 25 commentary, the references to "generalized" in §1.3.1 merit deletion. References to "generalized limitation in intellectual functioning" are anachronisms. They were present in the 1983 AAMR definition. See AAMR, Mental Retardation: Definitions, Classification, and Systems of Supports, 10th Edition (2002), at p. 22. The 2002 AAMR criteria affirmatively reject the notion that limitations must be "generalized". Rather, they recite that "within an individual, limitations often coexist with strengths". At pp. 8 and 23.

Seventh, in response to my inquiry concerning the qualifications of some higher functioning individuals (e.g. those with Prader Willi or Asperger's) at the April 17 meeting, DDDS indicated that they would still have to be deficient in one adaptive skill context under §1.4.1.1. Consistent with my April 25 commentary, I recommend that DDDS consider a similar approach to I.Q in assessing mental retardation. Rather than invariably using full-

scale I.Q., I recommend that DDDS determine eligibility under the mental retardation category based on a qualifying score on a major scale. For example, on the WAIS and WISC-III, a verbal, performance or full-scale I.Q. score could be used. Consistent with the attachment, the WISC-IV contains 4 major scales - verbal comprehension index, perceptual reasoning index, working memory index, and processing speed index. Consistent with the attachments, the Social Security Administration approves applicants under the listing for mental retardation based on meeting any major "scale" (e.g. FS; V; P). This approach is also consistent with the AAMR view that "within an individual, limitations often coexist with strengths".

Eighth, §1.3 is problematic since it is more restrictive than the current (7/00) regulation. I attach a copy of the current regulation for facilitated reference. It categorically limits DDDS eligibility to the 4 listed conditions to the exclusion of all others. If a current client or applicant does not have a clinical diagnosis of Mental Retardation, Autism, Asperger's, or Prader-Will Syndrome, they will be categorically ineligible for DDDS services. This is contrary to the Division's enabling statute which contains no such limitation. See attached Title 29 Del.C. §7909A(b). Although the "Summary of Proposed Changes" section characterizes deletion of all references to "brain injury" and "other neurological conditions" as benign, this is inaccurate. Clinicians rarely include a diagnosis of mental retardation for patients with TBI, even moderate to severe TBI. Moreover, even using the most liberal interpretation of the DDDS regulation, all forms of pervasive developmental disorder (PDD) apart from Autism and Asperger's will be subject to stricter eligibility standards. DDDS does not require significant limitation of intellectual functioning for Autism or Asperger's, but it will required for all other forms of PDD.

I have the following recommendations.

A. Reinstate a variation on the current reference to "brain injury". As DDDS noted at the April 17 meeting, DDDS currently serves a number of individuals with brain injury. The current standard would encompass both TBI [Dementia Due to Head Trauma (294.1] and ABI, including Vascular Dementia (290.4x). I recommend adding the following §1.3.5: "Brain Injury, including Dementia Due to Head Trauma (294.1) (American Psychiatric Association Diagnostic & Statistical Manual - IV, 1994)".

B. Reinstate a variation on the current reference to "neurological condition". I recommend adding the following §1.3.6: "A neurological condition closely related to those listed in Pars. (1) - (5) of this subsection; including pervasive developmental disorder (American Psychiatric Association, Diagnostic & Statistical Manual-IV, 1994); if such condition results in an impairment of intellectual functioning and/or adaptive behavior similar to such conditions." Apart from Autism and Asperger's Syndrome, the PDD category encompasses Rett's Disorder (299.80), Childhood Disintegrative Disorder (299.10), and Pervasive Developmental Disorder NOS

(299.80). There are also forms of dementia [e.g. dementia due to other general medical conditions such as hydrocephalus (294.1)] that should logically be served by DDDS. I observed many individuals with hydrocephalus in the Stockley Center in the 1970s. Finally, severe Fetal Alcohol Syndrome or Shaken Baby Syndrome can result in very low intellectual functioning and depressed adaptive skills. There will invariably be some less prevalent conditions which result in intellectual or adaptive skill limitations similar to Mental Retardation, Autism, Asperger's, and Prader-Willi Syndrome.

Obviously, the most damaging feature of the new regulation is the categorical exclusion of persons with TBI and other neurological conditions covered by the current (7/00) regulation. The SCPD may wish to consider the following: 1) submitting the above comments to DDDS; 2) appearing at the July 30 public hearing; 3) requesting the Governor and legislators to encourage DDDS to reinstate TBI and "other neurological conditions"; 4) requesting the Governor's Advisory Council to DDDS to endorse the SCPD's comments and communicate that endorsement to the Governor; and 5) prompting other agencies and individuals to press policymakers and the Division to include "brain injury" and "other neurological conditions" within the eligibility standards.

Attachments

F:pub/bjh/legis/2007p&l/707bils
G:707bilsSunD